

DELTA PROTECTION COMMISSION

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**AGENDA ITEM #6**

January 15, 1999

To: Delta Protection Commission

From: Margit Aramburu, Executive Director

Subject: Office of Administrative Law Response Regarding Tri-TAC Request for
Regulatory Determination

Attached is the Office of Administrative Law (OAL) response to the letter sent by Delta Protection Commission staff and legal counsel regarding the Tri-TAC "Request for Regulatory Determination". The OAL response indicates that Utilities and Infrastructure Policy P-3 is a regulation, subject to OAL review.

The Commission was sued over this same matter, lost the suit, and subsequently readopted Utilities and Infrastructure Policy P-3 as a regulation. That regulation was approved by OAL on January 28, 1997.

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STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

In re:)	1999 OAL Determination No. 2
Request for Regulatory)	
Determination filed by)	[Docket No. 97-007]
TRI-TAC concerning the)	
policy of the DELTA)	January 7, 1999
PROTECTION COMMISSION)	
which regulates biosolids)	Determination Pursuant to
and recycled water¹)	Government Code Section 11340.5;
)	Title 1, California Code of
)	Regulations, Chapter 1, Article 3

Determination by: CHARLENE G. MATHIAS, Deputy Director

HERBERT F. BOLZ, Supervising Attorney
 DAVID POTTER, Senior Staff Counsel
 Regulatory Determinations Program

SYNOPSIS

The issue presented to the Office of Administrative Law ("OAL") is whether the Delta Protection Commission's policy on sewage disposal constitutes a "regulation," which is void unless adopted pursuant to the Administrative Procedure Act ("APA").

OAL has concluded that the policy is a "regulation," which must be promulgated in accordance with the APA in order to be valid. After the request for determination was filed, the Commission adopted the policy pursuant to the APA.²

ISSUE

The issue presented to the Office of Administrative Law ("OAL") is whether "Utilities and Infrastructure Policy P-3," contained in the Land Use and Resource Management Plan issued by the Delta Protection Commission, constitutes a "regulation," which is void unless adopted pursuant to the Administrative Procedure Act ("APA"). The policy prohibits siting new sewage treatment facilities and areas for sewage effluent and sludge disposal in the Sacramento-San Joaquin Delta Primary Zone. OAL has concluded that the Commission's Policy P-3 does constitute a "regulation," which must be promulgated in accordance with the APA in order to be valid.

ANALYSIS

I. IS THE APA GENERALLY APPLICABLE TO THE QUASI-LEGISLATIVE ENACTMENTS OF THE COMMISSION?

The Delta Protection Act of 1992 was enacted by the Legislature to recognize, preserve and protect the irreplaceable resources of the Sacramento - San Joaquin Delta for the use and enjoyment of current and future generations.³ Legislative findings concerning the importance of agricultural lands, levee systems, wildlife habitats, coordinated land use planning, Delta towns, ports, waterways, recreation, and property rights are set forth in Public Resources Code sections 29702 - 29714.

Public Resources Code section 29735 provides for the creation of the Delta Protection Commission consisting of 19 members. Section 29752 provides as follows:

"The commission shall adopt its own rules, regulations, and procedures necessary for its organization and operation."

The APA applies to *all* state agencies, except those "in the judicial or legislative departments."⁴ Since the Commission is in the executive branch of state government, OAL concludes that APA rulemaking requirements generally apply to the Commission.⁵

II. DOES THE CHALLENGED RULE CONSTITUTE A "REGULATION" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

Government Code section 11342, subdivision (g), defines "regulation" as:

"... *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any such rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure [Emphasis added.]"

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

"(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ["]regulation["] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]"

In *Grier v. Kizer*,⁶ the California Court of Appeal upheld OAL's two-part test⁷ as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule satisfies the above two parts of the test, OAL must conclude that it is a "regulation" and is subject to the APA. In applying the two-part test, however, OAL is mindful of the admonition of the *Grier* court:

"... because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA*. [Emphasis added.]"⁸

A. IS THE CHALLENGED RULE A "STANDARD OF GENERAL APPLICATION?"

The challenged rule is a component of the Commission's comprehensive long-term resource management plan ("Regional Plan"). To understand the effect of provisions included in the Regional Plan, it is necessary review the role of the Plan in furthering the Commission's purposes. Public Resources Code section 29760, subdivision (a), provides:

"Not later than October 1, 1994, the commission shall prepare and adopt, by a majority vote of the membership of the commission, and thereafter review and maintain, a comprehensive long-term resource management plan for land uses within the primary zone of the delta. The regional plan shall consist of the map of the primary zone and text or texts setting forth a description of the needs and goals for the delta and a statement of the policies, standards, and elements of the regional plan."

Public Resources Code section 29763 provides:

“Within 180 days of the adoption of the regional plan or any amendments by the commission, all local governments shall submit to the commission proposed amendments which will cause their general plans to be consistent with the criteria in Section 29763.5 with respect to land located within the primary zone.”

Public Resources Code section 29763.8 further provides:

“A local government shall adopt its proposed general plan amendments within 120 days after their approval by the commission.”

Thus, local governments with jurisdiction over lands within the primary zone of the Sacramento–San Joaquin Delta are obliged to conform their general plans with provisions of the Commission’s Regional Plan. By this means, provisions of the Regional Plan affect land use in the Delta Primary Zone.

For an agency policy to be of “general application,” it need not apply to all citizens of the state. It is sufficient if the rule applies to members of a class, kind or order.⁹ In this case, the challenged plan applies to a region of the state, rather than the whole, but it applies generally to all lands, and hence landowners, similarly situated within the region. Certain policies of limited application are exempt from APA procedures, however, the Commission’s Regional Plan is not sufficiently limited to qualify for such exemption. In *Faulkner v. California Toll Bridge Authority*¹⁰ the Supreme Court considered whether resolutions adopted by the California Toll Bridge Authority were regulations. The resolutions were issued for the purposes of:

“either approving or disapproving . . . the recommendation of the Department of Public Works that the [Richmond-San Rafael Toll] bridge be constructed and of authorizing the issuance of revenue bonds following approval of such recommendation.”

The Court found:

“inasmuch as the “application” . . . relates only to one particular bridge, and solely to the specific project described, and as the resolutions (as alleged) do not purport to treat generally with, for instance, all bridges or all toll bridges or *any open class under the jurisdiction of the authority*, we are satisfied that [the argument that the resolutions are of general application] is without merit.”
(Emphasis added.)

The Commission’s Regional Plan, on the other hand, applies generally to all lands within the jurisdiction of the Commission and within the Delta Primary Zone, a broad geographical area of over 700 square miles.¹¹ OAL concludes that the challenged Regional Plan contains standards of general application.

The Regional Plan is divided into eight areas of concern, with findings, *policies*, and recommendations for each. The Requester challenges Policy P-3, under the category “Utilities and Infrastructure.” Policy P-3 provides:

“New sewage treatment facilities (including storage ponds) and areas for disposal of sewage effluent and sewage sludge shall not be located within the Delta Primary Zone. [Note: The Rio Vista project, as described in the adopted Final Environmental Impact Report for such project, and the Ironhouse Sanitary District use of Jersey Island for disposal of treated wastewater and biosolids are exempt from this policy.]”

Based on the foregoing information, OAL concludes that Policy P-3 applies generally throughout the Delta Primary Zone, and is a standard of general application.

B. DOES THE CHALLENGED RULE INTERPRET, IMPLEMENT, OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE AGENCY OR GOVERN THE AGENCY’S PROCEDURE?

Public Resources Code section 29760, subdivision (a), provides:

“Not later than October 1, 1994, the commission shall prepare and adopt, by a majority vote of the membership of the commission, and thereafter review and maintain, a comprehensive long-term resource management plan for land uses within the primary zone of the delta. The regional plan shall consist of the map of the primary zone and text or texts setting forth a description of the needs and goals for the delta and a statement of the policies, standards, and elements of the regional plan.”

Policy P-3, prohibiting the siting of new sewage treatment facilities and areas for disposal of sewage effluent and sewage sludge within the Delta Primary Zone, is a component of the Regional Plan developed by the Commission in response to this legislative mandate. The Delta Protection Act of 1992 is replete with statements of the Legislature’s purpose and goals for Delta protection, but contains no express provision regarding sewage treatment facilities, effluent, and sludge. Policy P-3 was adopted by the Commission to further goals identified under the Act related to land use, agriculture, and flood protection. Policy P-3, by its prohibition of new sewage treatment facilities and disposal areas, implements and interprets Public Resources Code section 29760. Policy P-3 is therefore a “regulation” within the meaning of Government Code section 11342, subdivision (g).¹²

III. DOES THE CHALLENGED RULE FOUND TO BE A “REGULATION” FALL WITHIN ANY ESTABLISHED EXPRESS GENERAL EXCEPTION TO APA REQUIREMENTS?

The APA provides a limited number of general exceptions to its rulemaking requirements. Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.¹³ None of the exceptions apply to the Commission’s “regulation” prohibiting the siting of new sewage treatment facilities and disposal areas within the Delta Primary Zone.

CONCLUSION

For the reasons set forth above, OAL concludes that challenged policy P-3 is a "regulation" within the meaning of Government Code section 11342, which is required to be adopted pursuant to the rulemaking requirements of the APA. No exceptions to the APA requirements apply to the Commission concerning the policy found to be a "regulation." The Commission adopted the policy on sewage disposal pursuant to the APA in 1997.

DATE: January 7, 1999

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ENDNOTES gvs

1. This request for determination was submitted by Robert Baker, Central Contra Costa Sanitary District, 5019 Imhoff Place, Martinez, CA 94553 (510) 229-7302 on behalf of Tri-TAC, a non-profit professional organization sponsored by the League of California Cities, California Association of Sanitation Agencies, and the California Water Pollution Control Association, "requester." The Delta Protection Commission was represented by Margit Aramburu, Executive Director, 14215 River Road, P.O. Box 530, Walnut Grove, CA 95690 (916) 776-2290.

On September 18, 1998, OAL published a summary of this Request for Determination in the California Regulatory Notice Register ("CRNR") 98, No. 38-Z, p. 1869, along with a notice inviting public comment. No public comments were received. The Delta Protection Commission filed a response to the request for determination.
2. After this request for determination was filed with OAL, the Commission adopted Utilities and Infrastructure Policy P-3 pursuant to the APA. The policy is now codified in CCR, Title 14, section 20030, filed with the Secretary of State on 1-28-97 and operative on 2-27-97.
3. Delta Protection Act of 1992, Public Resource Code sections 29700 - 29780, 29701.
4. Government Code section 11342, subdivision (a). See Government Code sections 11346; 11343.
5. See, *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 609.
6. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. We note that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr.2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 200, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

Tidewater itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

7. The *Grier* Court stated:

"The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' (1987 OAL Determination No. 10, *supra*, slip op'n., at p. 8.)

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--1987 OAL Determination No. 10--was published in California Regulatory Notice Register 98, No. 8-Z, February 23, 1996, p. 292.

8. (1990) 219 Cal.App.3d 422, 438; 268 Cal.Rptr. 244, 253; *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557.
9. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622; 167 Cal.Rptr.552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class.)
10. *Faulkner v. California Toll Bridge Authority* (1953) 140 C.2d 317, 323; 253 P.2d 659.
11. See the Commissions comprehensive long-term resource management plan, page 1.
12. The Commission tacitly acknowledged that the challenged rule is a "regulation" when it initiated rulemaking to adopt Policy P-3 pursuant to the APA after this determination was requested.
13. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
 - a. Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (g).)
 - b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec.11342, subd. (g).)

- c. Rules that "[establish] or [fix], *rates, prices, or tariffs*." (Gov. Code, sec. 11343, subd. (a)(1).)
- d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
- e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (e).)
- f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest). The most complete OAL analysis of the "contract defense" may be found in 1991 OAL Determination No. 6, pp. 175-177. Like *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, **1990 OAL Determination No. 6** (Department of Education, Child Development Division, March 20, 1990, Docket No. 89-012), California Regulatory Notice Register 90, No. 13-Z, March 30, 1990, p. 496, rejected the idea that *City of San Joaquin* (cited above) was still good law.